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Mark V. Tushnet
Georgetown University Law Center, tushnet@law.georgetown.edu

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By MARK TUSHNET*

ACCORDING TO PROFESSOR Christopher Eisgruber, judicial review of the sort embedded in United States constitutional practice is a practical mechanism for implementing the Constitution's commitment to self-government.[1] "The justices . . . make a distinctive contribution to representative democracy" because they are "better positioned [than elected officials] to represent the people's convictions about what is right."[2] Judges can articulate "a conception of justice with which Americans in general [can] plausibly identify themselves."[3]

I will focus here on two themes in Professor Eisgruber's argument. The first theme can be found in many works of constitutional theory—the construction of a strong opposition between the supposedly debased behavior of elected representatives and the supposedly more elevated behavior of judges. The differences in behavior are said to arise from the differences in incentives on actors in each institution. Elected representatives pander to get re-elected, while judges simply want to be remembered "as having performed their jobs well."[4] In Part I of this Review-Essay, I argue that this opposition is overstated in two ways: First, there are indeed policy domains in which representatives do have incentives to pander, such as with respect to "pork barrel" legislation aimed at delivering specific material goods to their constituents, but judges have generally refrained from intervening in these policy domains. Second, elected representatives have incentives to act according to principle, the principles to which a majority of

* Carmack Waterhouse Professor of Constitutional Law, Georgetown University Law Center.

1. *See* CHRISTOPHER L. EISGRUBER, CONSTITUTIONAL SELF-GOVERNMENT 3 (2001). For discussions of alternative models of judicial review, see Stephen Gardbaum, *The New Commonwealth Model of Constitutionalism*, 49 AM. J. COMP. L. 707 (2002); Mark Tushnet, *Review of Kent Roach, The Supreme Court on Trial: Judicial Activism or Democratic Dialogue*, U. TORONTO L.J. (forthcoming 2002).

2. EISGRUBER, *supra* note 1, at 5.

3. *Id.* at 126.

4. *Id.* at 58.

their constituents may adhere.[5] In short, Professor Eisgruber's defense of judicial review makes most sense precisely in policy domains where courts do not operate, and makes least sense in domains where they do.

The second theme emerges from Professor Eisgruber's distinction between comprehensive rights, which call for "an assessment of an entire system of social interaction," and discrete rights that "prescribe[ ] specific forms of government actions."[6] Professor Eisgruber argues that judges should be cautious about enforcing comprehensive rights. Here, I argue in Part II, the underlying concern is with the topic that United States constitutional theorists regard as vampires do crosses: the possibility of using the Constitution to enforce social welfare rights. But, Professor Eisgruber overlooks the fact that sometimes courts enforce traditional rights—against limits on free expression and against discrimination—in ways that show that apparently discrete rights are indistinguishable from comprehensive ones. If courts can enforce *these* discrete-comprehensive rights, perhaps they can enforce social welfare rights as well, particularly when we expand our understanding of the possible forms that judicial review can take.

I. Single-Institution "Comparisons"

Professor Eisgruber, like most law professors, has a jaundiced view of legislators and other officials directly responsible to the people. They "pander to voters, campaign for higher office, engineer an interest-group deal, or honor a party platform."[7] They engage in a "shameful pageant of partisan self-interest" when they periodically apportion legislative seats.[8] They resolve disputes in ways that lead losers

5. Professor Eisgruber's analysis is of a type well-criticized in NEIL KOMESAR, IMPERFECT ALTERNATIVES: CHOOSING INSTITUTIONS IN LAW, ECONOMICS, AND PUBLIC POLICY 22 (1994) ("It is not sufficient to note the existence of the other institution and the possibility that it too may be imperfect or expensive. The crucial question concerns the *relative merits* of the two institutions, when compared to each other."). *See, e.g., id.* at *92* (asserting that "we identified a connection between judicial review and self-government by calling attention to the inevitable imperfection of electorates, legislatures, and other institutions that might claim to speak for the people," without noting that this identification has ignored the equally inevitable imperfections of judges who make similar claims).

6. EISGRUBER, *supra* note 1, at 171.

7. *Id.* at 4.

8. *See id.* at 18. I think it worth noting that the Supreme Court is responsible for a fair amount of this partisanship. Its reapportionment decisions actually deny legislators the opportunity to act on principled views of how representation schemes serve democratic values that differ from the Supreme Court's quite restrictive view. With the opportunity to discuss principle taken away from them, legislators play the cards left in the deck after the Court threw out the face cards.

to believe that the winners wanted "to pad the[ir own] bank accounts."[9] Judges, in contrast, "are able to pursue politics in a fashion that is principled rather than partisan."[10] Judges can "resolve moral issues on the basis of the right kind of reasons— reasons of moral principle rather than self-interest."[11]

This account of incentives and institutions is vulnerable on three fronts. It overlooks the possibility that, with respect to the issues of most concern to Professor Eisgruber, the differences between elected officials and judges are not large enough to justify a strong version of judicial review. In addition, it mistakenly underestimates the degree to which elected officials in fact act on principle. Professor Eisgruber acknowledges that "elected officials and voters can, and sometimes do, treat moral principles seriously,"[12] but he does not take that point into account in any serious way in his analysis. Finally, Professor Eisgruber's account overlooks the limits on the degree to which judges are principled.

Professor Eisgruber's account of the incentives on elected officials trades on images we all have of legislators enacting pork-barrel legislation and making log-rolling trades in which one legislator offers her vote on an issue of concern to another legislator in exchange for the latter's vote on an issue of concern to the first. Of course vote-trading happens, and can be described as a process in which elected officials try to "pad the bank accounts" of their constituents,[13] who thereupon reward their representatives by "vot[ing] their pocketbooks."[14] This picture of the legislative process is accurate—but only, or at least primarily, with respect to a specific set of issues. Appropriation and tax bills are the classic versions of pork-barrel legislation; trade legislation, tariff bills, and—again—tax bills are the classic versions of statutes pervasively affected by vote-trading.

Of course one could approach tax bills and appropriations statutes with moral principle in mind. Different systems of public assistance to the needy reflect and express different moral judgments about social obligations to the needy; the ways in which we tax income and capital gains reflect and express moral judgments about the moral basis of collective action on various scales of size. So, one might

9. *Id.* at 55.
10. *Id.* at 4.
11. *Id.* at 55.
12. *Id.* at 76.
13. *See id.* at 55.
14. *Id.* at 60.

think, the courts would be well-positioned to counter the crassness of the legislative process by considering moral principle as they assess the constitutionality of such legislation.[15]

They do not, however. Nor does Professor Eisgruber have much to say directly about the proper role of courts in assessing the constitutionality of what the Supreme Court calls "the area of economics and social welfare."[16] Yet, on Professor Eisgruber's account of the institutional differences between courts and elected officials, this is the area where judges are pretty clearly substantially superior to elected officials. At the least, judicial abstention from aggressive review in this area poses a puzzle for Professor Eisgruber's descriptive account.

Indeed, the Court's abstention may pose an even more substantial difficulty, for it suggests that the courts—and Professor Eisgruber—may have judicial review exactly backwards. Courts do not do much in the area where elected officials are most likely to fit Professor Eisgruber's image of such officials. But, they intervene aggressively in areas where elected officials are likely either to advance their own considered moral views—just as, according to Professor Eisgruber, judges do—or to pander to voters by acting in accordance with voters' moral views rather than the voters' "mere preferences."[17]

Why do legislators enact laws restricting the availability of abortions, or statutes prohibiting flag-burning as a means of political protest, or laws regulating the distribution of sexually explicit materials in cyberspace, or laws prohibiting human cloning? Obviously, not because they, or their constituents, hope to "pad the[ir] bank accounts" or because they, or their constituents, "fear[ ] loss of income, property, or prestige,"[18] but because they, or their constituents, think that the prohibited practices are bad things.

15. *But see* Cass Sunstein, *Naked Preferences and the Constitution*, 84 COLUM. L. REV. 1689 (1984) (arguing that the Supreme Court's decisions in "mere rationality" cases do at least articulate a demand that the statutes at issue serve some public interest).

16. Dandridge v. Williams, 397 U.S. 471, 485 (1970). The index contains no entries for *Dandridge*, the related case of *Jefferson v. Hackney*, 406 U.S. 535 (1972), social welfare rights, public assistance, or welfare. The entries under *Taxation* do not address the issue discussed here. For a discussion of the way in which Professor Eisgruber indirectly addresses the judicial role in enforcing social welfare rights, see *infra* text accompanying notes 57–63.

17. EISGRUBER, *supra* note 1, at 55.

18. *Id.* at 60. One could develop a fancy account of how people who oppose flag-burning lose prestige when flag-burning occurs (an account that would have to distinguish between such a loss of prestige and the loss that occurs when the legislature adopts a program of public assistance different from the one favored by people who might be said to lose prestige upon its enactment), but I doubt that Professor Eisgruber had such an

According to Professor Eisgruber, "[e]ven if politicians and judges are equally moral and equally insightful, it is easier for judges to act on their moral convictions" and "to exercise their judgment untainted by avarice or personal ambition."[19] I think we can put avarice aside in considering the purported advantages judges have over elected officials in assessing the moral significance of laws against flag-burning or restricting the availability of abortions.

In assessing the relative advantage of judges over elected officials, we should consider elected officials who act on their own judgments about what morality requires, or who respond to their perception of what a majority of their constituents believe to be required by, or consistent with, moral principle. On matters raising questions of moral principle, elected officials' incentives are more complicated than "avarice" or "padding bank accounts." Indeed, among their incentives is the desire, shared with judges as Professor Eisgruber describes judges, to be remembered "as having performed their jobs well," where, once again, the elected officials' understanding of the nature of their jobs goes well beyond simply bringing home the bacon for their constituents.[20]

An elected official might be in a position to act on her own judgment for a number of reasons. The official might have been so good at delivering the pork that her constituents cut her some slack on some issues implicating moral principle.[21] Or, the constituents might think that the elected official has a kind of experience they lack on matters of moral significance, and defer somewhat to her judgment. Or, finally, the constituents may place positive value on having a representative who "thinks independently"—not merely independently of party officials, but of the constituents themselves.

What, though, of the elected official who "panders" to the moral judgments of her constituents? I doubt that it is helpful to deprecate her action as reflecting simple "personal ambition." Suppose a politician interested in re-election or in seeking higher office calculates that acting in accordance with the considered moral views of her pre-

account in mind in contrasting legislators who have such a fear and judges who do not. He certainly does not develop such an account in his book.

19. *Id.* at 58.

20. I assert this as a fact. For some support in the political science literature, *see, e.g.*, RICHARD F. FENNO, HOME STYLE: HOUSE MEMBERS IN THEIR DISTRICTS (1978).

21. Although, of course, an elected official who is good at delivering the pork cannot get too far out of line with her constituents' views on issues of moral principle, because the constituents will, at some point, conclude that the official has traded too much principle for too little pork.

sent or prospective constituents will advance her ambitions. The politician supports flag-burning legislation not because *she* believes it justified by the best moral theory—assume that she actually has no considered views on that question[22]—but because her constituents do. The mere fact that the official *is* motivated by personal ambition does not seem to me to demonstrate that judges have an advantage. True, the elected official might not be resolving a moral issue *directly* "on the basis of the right kind of reasons—reasons of moral principle rather than self-interest,"[23] but she is invoking the right kinds of reasons *indirectly*, because her self-interest lies in resolving the moral issue on the basis of the moral reasons held by her constituents.

Professor Eisgruber does not devote much attention to voters whose support for a politician turns on their moral judgments, perhaps because he has constructed a dichotomy in which voters act only on the basis of material self-interest. But, perhaps his concern is that voters who act on moral judgments do not act on the right *kind* of moral judgments. Voters have moral views, of course, but perhaps their moral judgments are imperfect—or, more precisely, are more imperfect than judges' moral judgments. I would suppose that the idea here would be that voters' moral judgments are insufficiently reflective: A seven-second television spot ad shows someone burning a flag or shows a child at a library apparently accessing pornography on the Internet or a modern Dr. Frankenstein cloning a human being, and voters simply want to stop that stuff without considering whether considerations of free expression or other moral considerations outweigh whatever moral judgments lie behind their dislike. Judges, in contrast, have the advantage of deciding cases deliberately, that is, with deliberation about all the relevant moral considerations.

I believe there are two difficulties with this line of argument.[24] First, it overlooks two possibilities arising from the nature of represen-

22. Different issues would arise, going to role morality rather than constitutional theory, were the legislator to think the proposal incompatible with her considered views on whether the statute is justified.

23. EISGRUBER, *supra* note 1, at 55.

24. I admit to some diffidence in pursuing this line of argument, because Professor Eisgruber asserts that he is offering a new way of explaining and defending judicial review, and the argument that judges are more deliberative than either voters or elected officials is old. For example, Alexander Bickel referred to the judicial advantage in "hav[ing] the leisure, the training, and the insulation to follow the ways of the scholar." ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 25 (1962). But I do not know what other line of argument Professor Eisgruber might develop in response to the observation that elected officials, sometimes independently and sometimes derivatively, act on their or their constituents' moral judgments.

tative democracy. Madison's optimistic observation that deliberation among elected representatives might "refine and enlarge the public views"[25] reflects one of these possibilities: Elected representatives might, for reasons I have sketched, be in a position to deliberate in roughly the same way that judges do.

The other possibility for deliberation among the public is a bit less optimistic. Suppose that a great many elected officials simply parrot the unreflective moral judgments of their constituents, but that some elected officials have room to act on their own moral judgments. Sometimes the latter group of officials may be in a position to control the legislative outcome. Once again, in such instances I would not be confident in asserting that judges had an advantage over the legislative process taken as a whole if the judges asserted that a statute was inconsistent with fundamental moral principle (or with those fundamental moral principles that characterize the American people).

The second difficulty with the claim that public views on moral questions are insufficiently deliberative or considered is that it overlooks the fact that moral questions are often quite hard. I personally am quite convinced that laws restricting flag-burning as a method of political protest are incompatible with basic American principles of free expression, the adjective here signaling that my judgment rests in part on an account of American nationhood and therefore is compatible with, and perhaps even mandated by, patriotism properly understood. I acknowledge, though, that there are accounts of patriotism different from mine, according to which *failing* to prohibit flag-burning as a means of political protest is incompatible with patriotism properly understood.[26] More generally, what to one person looks like an ill-considered moral judgment that would be altered under ideal conditions—after deliberation, or with campaign advertising restricted —is to the person who has made that judgment, as fully considered a judgment as there can be.

In the domain where the Supreme Court mostly operates, much of the disagreement between contending sides is straight-forward, difficult moral disagreement. I think it clearly insufficient to dismiss the moral judgments made by voters or their representatives as motivated by avarice or self-interest in a disparaging sense. If Professor Eisgruber's underlying view is that voters' moral judgments are not fully

25. THE FEDERALIST NO. 10 (JAMES MADISON).

26. *See, e.g.*, Richard D. Parker, *Homeland: An Essay on Patriotism*, 25 HARV. J. L. & PUB. POL'Y 407 (2002).

considered, I think we deserve a more substantial argument for that conclusion than he offers.

Professor Eisgruber provides a brief case study of the response by public officials to deep moral questions in his discussion of the *Cruzan* case. Professor Eisgruber is plainly exercised by the case, asserting that "one might well regard it as abominable for politicians to mess with the lives of severely ill patients for the benefit of their own careers or causes."[27] The case involved an effort by the family of Nancy Cruzan, a woman in a coma from which she was apparently unlikely ever to emerge, to obtain legal permission to terminate the "life"-sustaining treatment she was receiving.[28] Here is the analysis Professor Eisgruber provides in the text of actions of the state's elected officials:

> [T]he Missouri attorney general may have been more interested in advancing his political agenda than in protecting Nancy Cruzan's interests. By taking the position that human life is always sacred, the attorney general scored points with Missouri's powerful anti-abortion lobby. Indeed, there is one piece of evidence which strongly suggests that Missouri's attorney general was using Nancy Cruzan as a political symbol: after winning the *Cruzan* case, the attorney general withdrew from later trial court proceedings. Missouri thereby enable Cruzan's family to disconnect her from the machines that were prolonging her existence. If Missouri really cared about Nancy Cruzan's life, why would its attorney general permit her medical treatment to end after her legal battle left the public limelight?[29]

Material in Professor Eisgruber's endnotes supplements the story. Professor Eisgruber quotes a lawyer appointed to represent Nancy Cruzan's interests as asserting that the attorney general "withdrew from the case for strategic, partisan reasons," and notes the attorney general's denial of the allegation.[30] The endnote continues, "[a]lmost immediately after Cruzan's death, . . . [the attorney general] began waging a new battle in an almost identical case," which later "became

27. EISGRUBER, *supra* note 1, at 59. One signal of the difficulty with Professor Eisgruber's position is his apparent belief that acting out of concern for "careers" and for "causes" are equally disreputable. Professor Eisgruber appears to believe, though with no apparent basis, that a person who seeks to advance a cause is necessarily insensitive to competing considerations. *See infra* note 53. But, I would have thought, one could advance a cause after taking all the relevant considerations into account and concluding that, in the circumstances, advancing the cause is morally preferable to any other course.

28. I put *life* in scare-quotes to indicate that one characterization of the issue in *Cruzan* is whether she was in fact still alive in a morally meaningful sense.

29. *Id.* at 58–59.

30. *Id.* at 224 n.31.

a campaign issue," with the winning candidate "promising to let [the woman's] family decide her fate."[31]

This is a very rich text. Professor Eisgruber moves from a tentative "may have" in his opening, to an assertion, qualified by a "might well regard it," that the politician's behavior was "abominable." The attorney general is said to have scored points with a powerful lobby. But, notice that the "lobby" consists of people who believe that abortion is immoral. So, on the most disparaging characterization of the attorney general's action, he was responding to the deeply held moral views of a substantial number of his constituents. And, against the claim that he acted in narrowly strategic way, there is the endnote's observation that the attorney general pursued "an almost identical case" after *Cruzan*'s resolution.[32]

In short, there is almost nothing to support the assertion that the *Cruzan* litigation demonstrates how politicians motivated by narrow self-interest and not by moral principle end up messing with people's lives. But, even more remarkably, there is nothing whatever in the *Cruzan* litigation to show that judges are better at responding to moral principle than politicians. For, after all, Missouri *won* the case. That is, the judges—"disinterested," in Professor Eisgruber's term,[33] unlike the mean-spirited politicians out to win votes—agreed with Missouri's attorney general. Of course this might only show that in *Cruzan*, the moral judgments made by disinterested judges converged by happenstance with decisions driven by political calculations of careerist politicians. Still, one might well regard the *Cruzan* case as an illustration of the proposition that disinterested judges can mess with people's lives at least as much as politicians can—or, perhaps, that what we are ob-

31. *Id.*

32. The claim that the attorney general was simply messing with Cruzan's life is said to be supported by his withdrawal from the case after the Supreme Court decided that the family could prevail only if they showed by clear and convincing evidence that Nancy Cruzan would have wished to die had she known what her circumstances would be. Withdrawing was inconsistent with the position, said to have been taken by the state's attorney general, that "human life is always sacred." But, the attorney general's position in the Supreme Court was not that human life was always sacred. At that stage all parties agreed that no legal obstacle prevented *Nancy* Cruzan from deciding to terminate her treatment. The family contended that, with Nancy unable to state her preference, the family's assertions about her preferences had to be accepted, whereas the state contended that a court had to determine to its satisfaction what her preferences were (or would have been). Having established that the Constitution did not require the state to take the family's assertions as conclusive, the attorney general need not have been concerned with whether the family could satisfy the evidentiary requirements of Missouri law.

33. *See id.* at 59.

serving is sincere disagreement between and among politicians and judges about what moral principle requires.

Professor Eisgruber knows that many public issues are resolved on the basis of direct moral judgments by voters and their representatives, but overlooks the importance of that point. In one of his discussions of the abortion issue, Professor Eisgruber responds to critics who have argued not that it denied the electorate the power to enact its considered moral judgments but rather that the Court's decision truncated public and legislative discussions, foreclosing "the ability to negotiate pragmatic solutions."[34] Professor Eisgruber replies that the Supreme Court probably could not have done much to defuse the "volatile" abortion issue.[35] The critics Professor Eisgruber addresses hope that "absent Court intervention, the legislature would be better able to negotiate a compromise among the bitterly divided factions that inevitably exist within American society."[36] But, Professor Eisgruber observes, "what reason do we have to think that legislative log-rolling would be a good way to address moral divisions within society?"[37] He continues,

> The best we can hope is that American institutions will sponsor an articulate and thoughtful inquiry into the diverse opinions held by the American people, and that, over time, people will move in the right direction. As we have seen, the disinterestedness of Supreme Court justices enhances the likelihood both that they will engage in such an inquiry and that they will inspire American citizens to do likewise.[38]

I find this defense of judicial review quite puzzling. First, and most obvious, opponents of abortion are hardly in favor of legislative log-rolling; they have firmly held moral views that they would like to enact into law.[39] Their problem is that the Supreme Court will not let them. A second-best solution for them is legislative log-rolling, but that solution is entirely derivative of the Supreme Court's position. A defender of the Supreme Court can hardly criticize the legislature for

34. *Id.* at 99.

35. *See id.* at 100.

36. *Id.* at 101.

37. *Id.*

38. *Id.* at 101–02.

39. Some of the critics Professor Eisgruber addresses are actually supporters of abortion rights, dismayed that the Supreme Court's decisions appear to have had adverse long-term consequences for the stable resolution of the abortion controversy in favor of relatively unrestricted access to abortion.

engaging in log-rolling when that practice would not occur in the absence of judicial review.[40]

Second, and related, the Court might "sponsor an articulate and thoughtful inquiry" into the moral basis of widespread public views, but the people who engage in that inquiry are rather like Glendower: They, like him, can call the spirits from the vastly deep, but the Supreme Court will not let the spirits answer.[41] Early in the book Professor Eisgruber notes that judges have a "democratic pedigree,"[42] being selected by the elected branches. So, perhaps the product of the "articulate and thoughtful inquiry" into some question of moral substance is not a resolution of the question directly, but is instead the selection of judges who indirectly offer the people the answer the people like. Here, though, two problems arise: The interim costs before the courts' composition changes—the millions of babies killed, as proponents of restrictive abortion laws would have it—can be quite high. And, the courts' composition might change too slowly, in the sense that the people might have arrived at a well-considered judgment on the merits of the question some years before enough judges retire or die to change the courts' composition in the right direction.

It would be tedious to go through the liberal and conservative individual rights agendas to demonstrate, as I think I could, that mostly, what is going on is the sort of sincere disagreement reflected in *Cruzan* and the abortion controversy: On the conservative side, claims that hate speech legislation, campaign finance laws, and affirmative action programs are unconstitutional; on the liberal side, claims that sexually explicit material should be available with little restriction, that flag-burning cannot be prohibited, that abortions should be available to those who want them—these claims attack statutes justified by different moral judgments than those reached by the statutes' challengers. Of course one can conjure up accounts of how affirmative action programs, hate speech legislation, restrictive abortion laws, anti-pornography laws, and everything else that legislatures do result from squalid interest group deals that pad people's pocketbooks. Such accounts, however, would implausibly discount the evident

40. *See also supra* note 8 (noting the impact the Supreme Court's reapportionment decisions have had on legislative behavior).

41. *See* WILLIAM SHAKESPEARE, THE FIRST PART OF KING HENRY THE FOURTH act 3, sc. 1 ("Glendower: I can call spirits from the vast deep. Hotspur: Why, so can I, or so can any man; But will they come when you do call for them?").

42. EISGRUBER, *supra* note 1, at 64.

moral motivations at work in the electoral and legislative processes.[43] To the extent that voters and elected officials do act on moral principle, Professor Eisgruber's case for judges is at best overstated.

So far my comments have focused primarily on the role moral principle plays in the actions of elected officials. What of judges? The Supreme Court's decision in *Cruzan* suggests caution if one thinks that the elected officials behaved badly there. Professor Eisgruber acknowledges that the incentives inducing judges to act in a principled way can "misfire," as when "[j]udges . . . may feel deep attachments to a political party, or to their social class, or to the legal profession, or to some ideological platform."[44] I think it a bit off to say that the behavior induced by these attachments results from the misfiring of other incentives. Professor Eisgruber argues that judges are able to respond to principled arguments precisely because they are free of the pressures toward crassness that the need to be elected and re-elected creates. That freedom, though, is also what gives judges the ability to respond to the "deep attachments" they feel. In a world of freedom, that is, judges *can* be principled, but they also can be less principled as well. Judicial attachment to principle, then, is actually a matter of degree.

I have no doubt that judges and elected officials are located at different positions on the continuum of motivations between the principled and the crass. Or, more accurately, they are located at different positions on the numerous continua in various policy domains. Professor Eisgruber does not really examine where they *are* located in any specific domain. Judges and elected officials may well be rather closer to each other on some overall continuum than Professor Eisgruber's rhetoric suggests. The case for a strong version of judicial review is weakened the smaller the distance is. In addition, as I have argued, judges and elected officials might well be quite far apart on the continuum in some policy domain (the domain of economic policy, for example) but quite close on the continuum in some other domain (the domain of constitutional privacy, for example). The case for a strong version of judicial review is best where judges and elected officials are farthest apart. But, it seems to me, existing constitutional doc-

43. For a similarly cautionary observation about overusing positive political theory accounts of the legislative process, see Philip P. Frickey & Steven S. Smith, *Judicial Review, the Congressional Process, and the Federalism Cases: An Interdisciplinary Critique*, 111 YALE L.J. 1707, 1729–30 (2002) (warning against "the embrace of a universal formal theory of congressional action").

44. EISGRUBER, *infra* note 1, at 63–64. For more on the observation about ideological platforms, see *infra* note 5.

trine gets the matter backwards: Judges do not intervene when the chances that elected officials are pandering are greater, and do intervene when there is a decent case for the view that elected officials are simply acting on views of principle that simply differ from the judges' views.

Professor Eisgruber offers a pragmatic assessment of the Supreme Court's performance. He concludes, "Though virtually everybody is upset about one case or another, few observers look at the Court's track record and claim, with the benefit of hindsight, that the United States would have been better off *during the last fifty years* without judicial review."[45] Professor Eisgruber's list of the Supreme Court's "greatest moments" is *Brown v. Board of Education*,[46] the reapportionment cases, the Pentagon Papers case, and *United States v. Nixon*.[47] This, it seems to me, is simple academic gerrymandering.[48] It omits the abortion cases, the affirmative action cases, the racial redistricting cases, and the Court's grudging interpretation of Congress's power under Section Five of the Fourteenth Amendment—all, I note, more recent than the cases, other than *Nixon*, that Professor Eisgruber praises. Nor does Professor Eisgruber's evaluation, offered as supporting a judgment about the comparative contributions to how well off the United States has been of judges and elected officials, seriously take into account the extent to which the past fifty years have been shaped by civil rights statutes, broadly understood to include enactments like the Americans With Disabilities Act. Legislatures have done some good, after all. I have no idea what the "on balance, all things considered" pragmatic judgment should be. I do know that Professor Eisgruber

45. *Id.* at 73 (emphasis added).

46. The repeated citation of *Brown* against critics of judicial review seems to me a trope worth both comment and abandonment. *See* Brown v. Board of Education, 347 U.S. 483 (1954). In another context, Harold Koh identified a similar (partisan) invocation of a case as the "'*Curtiss-Wright*, so I'm right' cite." HAROLD HONG-JU KOH, THE NATIONAL SECURITY CONSTITUTION 94 (1990).

47. 418 U.S. 683 (1974). *See* EISGRUBER, *supra* note 1, at 73.

48. Defending the abortion cases against the criticism that they distorted public debate, Professor Eisgruber notes that the abortion issue raised a host of cultural, political, and constitutional questions, and says that "it seems likely that the abortion issue was destined to ignite one way or another." *Id.* at 100. A cynic might say that Professor Eisgruber's gerrymandering is this: When someone says that the Supreme Court made the nation worse off, Professor Eisgruber replies that things would have gone wrong anyway; when someone says that the nation would have gotten better by the acts of elected officials and voters, Professor Eisgruber replies that, as things actually happened, the Supreme Court made a positive contribution. I doubt that he can have it both ways: One must be counterfactual in both cases, or factual in both.

does not come close to providing a serious case to support his confident assertion that the Court made the United States better off.[49]

II. Discrete Rights, Judicial Capacity, and Social Welfare Rights

For Professor Eisgruber, judges must "act on the basis of a conception of justice with which Americans in general could plausibly identify themselves."[50] And, as we have seen, he wants judges to articulate legal rules that express moral principles that, in turn, would induce the people to "move in the right direction."[51] At this point the specter that haunts liberal constitutional theory appears. For, on any plausible account of political morality, a society's distribution of material goods is a proper subject of moral evaluation. So, if courts are "to speak on behalf of the people about questions of moral and political principle,"[52] it would seem that courts should develop a constitutional jurisprudence of social welfare rights. Social democracy offers the kind of conception of social justice with which Americans could identify themselves. The social democratic tradition can be located in the Populist movement of the late nineteenth century, it found expression in some aspects of the Progressive agenda early in the twentieth, and it provided important support for the social welfare programs of the New Deal and the later War on Poverty. Exemplary figures in that tradition are Eugene V. Debs, Dorothy Day, and Michael Harrington.[53]

49. For an extremely careful discussion of what we would need to know to make such a judgment, *see* Wojciech Sadurski, *Judicial Review and the Protection of Constitutional Rights*, 22 OXFORD J. LEG. STUD. 275 (2002). I think the emerging judgment among liberals is more that, from 1954 (*Brown*) to sometime in the 1970s or early 1980s, the United States was better off for having judicial review, and that for more recent years the "on balance" judgment is enormously complex and might well come out against judicial review. Those conclusions, though, cannot arise from the kind of incentive-based analysis Professor Eisgruber offers, because the structural incentives on which he relies have not substantially changed over, say, the last century. (Or, at least, some more complete analysis of the changes in incentives—on elected officials and on judges—would be needed to support the conclusion.)

50. EISGRUBER, *supra* note 1, at 126.

51. *Id.* at 101.

52. *Id.* at 3.

53. I admit to a personal interest here. I have already quoted Professor Eisgruber's observation that judges "may feel deep attachments to . . . some ideological platform." *Id.* at 100. The end-note he attaches to that observation describes as "shocking" a comment I made two decades ago, that were I a judge I would decide cases with an eye to results that would "advance the cause of socialism." *Id.* at 225 n.39. My position is "shocking," according to Professor Eisgruber, because it "smacks of ideological partisanship: a man dedicated to a cause sounds like one who has little inclination to consider new arguments and little

Why avoid the articulation of a social democratic theory of judicially enforceable social welfare rights? The answer to that question is easy: Liberal constitutional scholars fear that that way lies *Lochner*—that is, judicial enforcement of a conservative or libertarian economic account of social welfare rights.[54] Another question is harder: *How* to avoid articulating such a theory, given a willingness to articulate a theory of judicially enforceable rights of privacy and free expression? Professor Eisgruber uses a distinction between comprehensive moral principles, such as those dealing with distributive justice, and discrete ones, such as those dealing with privacy and free expression, to block the move in the direction of constitutionalized social welfare rights.

Professor Eisgruber develops this distinction out of his reflection on the fact that a court whose remit was limited to "matters of pure principle" would "do virtually nothing."[55] Translating moral principles into "legal rules with bite" requires judges to go beyond the principles themselves, and to develop supplements that allow the principles to which the judges respond to be enforced as law.[56] This task requires, in turn, that judges exercise strategic judgment in designing the legal rules. The distinction between discrete and comprehensive principles is a strategic one arising from the limits on judicial competence.

Professor Eisgruber introduces the distinction in his discussion of *Lochner v. New York*.[57] For Professor Eisgruber, one version of the

patience with anything that stands in the way of his program." *Id.* Consider other aspects of the American tradition: Is a judge who acts to advance the cause of liberal democracy an ideological partisan, with little inclination to consider new arguments and impatient with obstacles? A judge who acts to advance the cause of libertarianism? What must exercise Professor Eisgruber, I think, is either a narrow understanding of what it means to advance a cause, or that a constitutional program for social democracy would require courts to enforce comprehensive rights, whereas courts acting on a centrist liberal conception of justice need only enforce discrete rights.

I should note two additional points. First, to the extent that I remain committed to a constitutional program for social democracy, it most decidedly does not include vigorous judicial review. *See, e.g.*, MARK TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS (1999) (arguing strenuously against the form of judicial review Professor Eisgruber defends). Second, my assertion about pursuing social democracy as a judge was followed immediately by the observation that the very fact that I held that view meant that I would not become one, a point consistent with Professor Eisgruber's observation that the manner in which judges are selected ensures that judges "are unlikely to be moral radicals." EISGRUBER, *supra* note 1, at 65.

54. I note that liberals may lack confidence in their judgment that the social welfare state is justified by the best moral and political theory. If that is why they fear *Lochner*—that is, they fear that Richard Epstein might be right about property rights—I wonder, what are the sources of their confidence in their judgments about constitutional privacy.

55. *Id.* at 136.

56. *Id.*

57. 198 U.S. 45 (1905).

moral principle underlying *Lochner* is attractive.[58] But, he argues, "the inevitable generality of claims related to social welfare . . . renders economic rights an inhospitable domain for judicial intervention. . . . Laws and transactions make a web of economic relationships, and it is that web as a whole, rather than particular nodes within it, that seems the appropriate target of moral scrutiny."[59] Claims about social welfare rights, that is, are comprehensive in "call[ing] for assessment of an entire system of social interaction."[60] In contrast, "other aspects of human liberty," such as free speech and personal autonomy, implicate "discrete parts of government practice,"[61] stating "particularized side-constraints upon governance."[62] Professor Eisgruber uses this distinction to examine and criticize the Supreme Court's decisions about government structures such as separation of powers and federalism. But, as he says, the distinction is different from the more traditional distinction between structure and rights: "Some side constraints secure individual liberties, but others describe structural restrictions upon government action."[63] In particular, "liberal constitutional claims about a minimum standard of welfare" implicate comprehensive rights,"[64] and it is on these on which this Section focuses.

The distinction between discrete and comprehensive rights is overdrawn, however. Many apparently simple cases involving what seem to be mere side-constraints on governance actually implicate "entire system[s] of social interaction," and can be justified only by evaluating the systems as a whole. I give some examples next, but it is important to keep in mind the aim of the argument—to undermine the claim that courts are reasonably good at enforcing discrete principles and probably bad at enforcing comprehensive ones by showing that courts actually enforce comprehensive principles in some relatively uncontroversial cases, and thereby to support indirectly the claim that courts can enforce social welfare rights as competently as they enforce these "discrete" principles.

Consider first the constitutional law of libel. As Professor Eisgruber argues, for strategic reasons the Supreme Court has created "a

58. *See id.* at 164–65 (asserting that Professor Eisgruber finds attractive the principle that, "[i]n a fair and well-functioning marketplace, people should be free to enter into contracts that enable them to improve their life by working harder and longer").

59. *Id.* at 165.

60. *Id.* at 171.

61. *Id.* at 165.

62. *Id.* at 170.

63. *Id.* at 171.

64. *Id.* at 166.

broad safe harbor" that immunizes commercial enterprises for making false statements about public figures unless the plaintiff shows that the false statements were made with actual malice.[65] The Court's rule "rest[s] upon a pragmatic judgment—such as a concern that juries will reach the wrong outcome, or that responsible speakers will be silenced because it is expensive to defend against meritless suits."[66] What are the costs and benefits of the Court's rule?[67] People suffer real damage to their reputations, of the sort for which monetary compensation is the ordinary remedy, but are unable to obtain compensation.[68] Commercial enterprises—newspapers, magazines, and broadcasters—make money off the stories they publish. The public benefits from the wider availability of information that occurs under the Court's rule than would occur under alternative rules. In short, some people are forced to subsidize media enterprises so that the public can benefit. In libel law, the Constitution does not operate simply as a side-constraint on governance; the Constitution mandates a distribution of wealth for the public good. The justification of the Court's rule must be that this distribution of wealth is better than the distribution that would occur under any alternative judicially enforceable rule. That looks to me like an "assessment of an entire system of social interaction," that is, the invocation of a comprehensive principle.[69]

Nor is the structure of libel law unusual in the law of free expression, which is pervaded by requirements that someone—usually the public—subsidize someone else, with the effect of denying the public the opportunity to use its resources for other ends such as assistance to the needy.[70] The point is easiest to see in a hypothetical case that, as far as I know, has not yet arisen, but about which most people's intuitions are quite clear. Begin with a wealthy candidate for public

65. *See id.* at 137.

66. *Id.* at 138.

67. The analysis that follows tracks Frederick Schauer, *Uncoupling Free Speech*, 92 COLUM. L. REV. 1321 (1992).

68. One could be skeptical about whether damage to reputation actually occurs, but a broad constitutional immunity is necessary only if (a) monetary awards would otherwise be forthcoming, (b) some of those awards would not accurately measure the real harm to reputation, and (c) ordinary methods of trial-level and appellate control over jury awards could not be counted on to reduce the rate of error to an acceptable level.

69. I do not know how various principles of wealth distribution would resolve the question of who, as between public figures and media enterprises, deserves the wealth accruing to reputation, but that is the question constitutional libel law poses.

70. Libel law is unusual only because the subsidy flows from one private party, the public figure, to another, the media enterprise, rather than from the public to some private party.

office who wants to use a public park for a rally of her supporters. The rally will impose some costs on the city beyond the usual costs associated with running a public park: some extra police will have to be assigned, and there will be more trash to clean up after the rally than there would be after an ordinary day. The city tells the candidate that she can have a permit to use the park for the rally only if she pays the excess costs attributable to the rally. Does the Constitution preclude the city from charging this fee?[71] If the city can charge the fee for excess costs to the wealthy candidate, can it charge a cost-justified fee to impecunious candidates, who cannot afford to pay? My sense is that people divide over the first question, but agree that the answer to the second is, "No, the city cannot charge a cost-justified fee to a political candidate who cannot afford to pay." If that is right, and I think it is, the First Amendment requires public subsidies for at least some political activities. But, of course, the money that has to be used to subsidize political activity could be used for other public purposes. Once again, then, the First Amendment creates a system of social interactions and is not a simple side-constraint.

The question of the cost-justified fee for a permit may seem esoteric, but its structure is the same as the basic question of public forums. That question is, "May a city refuse to make its streets or parks available for political demonstrations?" The answer, going back to *Hague v. C.I.O.*[72] and unquestioned since then, is that an absolute ban on the use of streets and parks for demonstrations is unconstitutional. These areas must be made available subject only to reasonable time and manner restrictions: A city can insist that a protest march avoid the city's major commuter routes during rush hour, but it cannot bar demonstrators from using that street, or one that provides the demonstrators with access to a roughly equivalent audience, after the rush hour has passed. A demonstration in the late morning will disrupt some traffic, but the cost of that disruption is one that the Constitution requires the city to bear. Or, more accurately, requires people in the city to bear: Some packages will not be delivered on time, some people will arrive late at meetings or miss them entirely, and so on. Again the First Amendment requires some people to subsidize others, and subsidy questions are questions about entire systems of social arrangements.

71. *See* Forsyth County, Georgia v. The Nationalist Movement, 505 U.S. 123 (1992) (invalidating a fee requirement where there was no mechanism in place to ensure that the fee was justified by the excess costs attributable to the rally).

72. 307 U.S. 496 (1939).

Palmore v. Sidoti shows that the problem arises outside the First Amendment.[73] The case involved a custody dispute. After the parent who had initially been awarded custody, a white woman, married an African American man, the family court shifted custody to the white father, saying that the new custody arrangement was in the child's best interests: Being with a single father would be better for the child than being a white child in a mixed-race marriage, given the social conditions of the United States. The posture of the case before the Supreme Court required the Court to accept the family court judge's assessment of the child's best interests. Conceding the possibility that changing custody from the mother to the father would be in the child's best interests, Chief Justice Burger wrote for a unanimous Court that the change in custody could not be justified by the social reality of persistent racism. The law, he wrote, could not even indirectly "give . . . effect" to private biases.[74] Here the child suffers real harm (or so the Court assumed) in the service of a greater social good, the eradication of racism from even indirect effects on public decision-making. That, again, is a subsidy, and needs to be assessed as such.

These cases show that the First Amendment and the Equal Protection Clause, in at least some aspects that I believe to be uncontroversial, implicitly invoke comprehensive principles dealing with the distribution of wealth and other social goods and are not merely discrete side-constraints on governance.[75] Professor Eisgruber sees the "discrete rights" cases as he does because of his understanding of the institutional structure within which judges operate. The most important aspect of that structure is that "the judiciary has limited options when it fashions relief. A court must issue an order that resolves the particular dispute in front of it. . . ."[76] The image upon which Profes-

73. 466 U.S. 429 (1984).

74. *Id.* at 433.

75. I acknowledge that the indirect argument I make could be rejected by agreeing that the courts are enforcing comprehensive principles in these cases and then arguing that the courts should take the same deferential stance with respect to them that they do with respect to social welfare rights. The cases raise problems near the heart of First Amendment and equality theory, however, and asserting that they are wrongly decided means rejecting a great deal of well-established law.

76. EISGRUBER, *supra* note 1, at 173. The sentence continues, "and it can only pass upon the questions that have been litigated in that case." That constraint is so obviously contingent that it can play no substantial role in an argument against judicial enforcement of social welfare rights. People will litigate comprehensive claims, and present the questions relevant to the resolution of such claims, if courts tell litigants that they can do so. Professor Eisgruber might be concerned that litigants could not identify all the questions relevant to the resolution of the "web," *id.* at 165, of issues raised by comprehensive claims,

sor Eisgruber trades here is the award of damages for violations of constitutional rights and, more important for my purposes, the injunction that bars a government from invoking an unconstitutional rule to prohibit a person from taking some action, such as using a street for a demonstration.

The "time, place, and manner" and cost-justified fee examples show that the discrete mandatory injunction actually is more ambitious than initially appears. The injunction against denying a permit for the demonstration embodies two judgments, not one. The first arises from the narrow structure of the particular litigation, and directs the city to allow the demonstration—unless the city responds appropriately to the second judgment. That judgment is contingent: It tells the city that it may deny the permit *if* it does so pursuant to a statute that provides reasonable access to the streets for demonstrations. We can treat this second judgment as providing the city with an inducement to plan well for the use of its resources.

Then, the question arises: Is it possible to structure the judicial remedies for violations of social welfare rights in a similarly contingent way that induces planning? The answer, we now know, is "Maybe it can." Professor Eisgruber notes that other nations have adopted judicial review in the form of "a mechanism whereby political appointees with a more or less democratic pedigree are insulated against direct electoral control and authorized to limit legislative power on the basis of controversial interpretations of abstract moral and political principles."[77] Limitations on legislative power come in different forms, though. In particular, such limitations need not take the form of an injunction against a discrete practice.

Consider the *Grootboom* decision of South Africa's Constitutional Court.[78] There a "group of people . . . lived in appalling conditions, [and] decided to move out and illegally occupied someone else's land. They were evicted and left homeless."[79] The government had designated the land they took over for subsidized low-cost housing.

but that concern can be resolved by a careful formulation of the manner in which courts address comprehensive claims. *See infra* text accompanying notes 84–85. (Professor Eisgruber also observes that judges decide cases "between particular parties," and "not all interested persons will have standing to appear before the court." *Id.* Professor Eisgruber seems to know that this institutional feature is not sufficient to support a strong distinction, noting the availability of procedural rules allowing other parties to intervene and to present *amicus* briefs).

77. *Id.* at 75.

78. *See* 2000 (11) BCLR 1169 (CC) .

79. *Id.* at ¶ 3.

South Africa's Constitutional Court held that the country's constitutional guarantee of "access to adequate housing," and its imposition on the state of a duty to "take reasonable legislative and other measures, within its available resources, to achieve the progressive realization of this right,"[80] imposed a "minimum core obligation" to adopt a reasonable legislative program aimed at securing housing for all.[81] In particular, the Constitutional Court evaluated the government's existing housing programs, using a standard of reasonableness, and held that the programs were not a reasonable method of implementing the constitutional guarantee because they did not have "a component catering for those in desperate need."[82] The government could provide this component constructing housing for the desperately needy itself, or by subsidizing the construction of such housing by private entrepreneurs, or by providing those in need with vouchers or other forms of "social assistance."[83] Notably, however, the Court's decision did not require the government to provide any particular plaintiff with housing in short order.[84]

Judicial review in the form of an order to plan is no panacea. There are obvious risks, in two directions: Plans may be created simply to satisfy the courts, with no real effort to implement them. The courts might take the plan at face value and declare victory, having had no effect on the actual implementation of social welfare rights.[85] Alternatively, courts may become frustrated with the pace at which the plans are implemented or with the content of the plans, and may intervene more aggressively, to the point where critics may fairly charge the courts with micromanagement.[86]

80. CONSTITUTION OF SOUTH AFRICA, § 26 (1)-(2).

81. *See* 2000 (11) BCLR ¶ 30.

82. *Id.* at ¶ 63. This element could involve providing temporary shelter pending the completion of more adequate permanent housing. In addition, the Court said, "[t]he absence of this component may have been acceptable if the nationwide housing progamme would result in affordable housing for most people within a reasonably short time." *Id.* at ¶ 65.

83. *Id.* at ¶ 36.

84. For a general treatment of approaches like that taken in *Grootboom*, *see* Michael C. Dorf & Charles F. Sabel, *A Constitution of Democratic Experimentalism*, 98 COLUM. L. REV. 267 (1998).

85. The United States experience with school finance litigation contains some examples of this phenomenon. For a discussion that may underplay the extent to which interactions between courts and legislatures led the courts to retreat without acknowledging the fact, *see* DOUGLAS S. REED, ON EQUAL TERMS: THE CONSTITUTIONAL POLITICS OF EDUCATIONAL OPPORTUNITY (2001).

86. The U.S. experience with prison reform litigation contains some examples of this phenomenon. For a discussion that may underplay the extent to which the courts came to

These risks do not mean that *Grootboom*-like judicial review exceeds the limits of judicial competence. The standard objection in liberal constitutional theory to judicial enforcement of social welfare rights rests on the judgment that courts lack the ability to specify fully what distributive justice requires. As Professor Eisgruber puts it, the principles of distributive justice seem to require an evaluation of the "web" of social interactions as a whole, and not a moral judgment on what happens at any particular node.[87] And, it would seem, courts could not possibly design an injunction that would effectively require the reconstruction of the web as a whole.

That judgment is correct, but *Grootboom*-like review does not require that courts spell out the requirements of distributive justice in detail. Plans of the sort envisioned in *Grootboom*-like review will never directly or completely specify the requirements of distributive justice even with respect to a limited subject like housing, much less with respect to the distribution of social welfare generally. Rather, such plans might be ordered when it appears to a court that some "node" is particularly thin, as in *Grootboom* where the government's public housing programs had no component addressing the plight of a desperately needy group. Further, a planning requirement is not inevitably final. A government might respond with a plan that simply reiterates its existing programs, supplemented with an explanation to the courts of why the judges' initial assessment of the programs' inadequacy—of the thin-ness of the "node"—was mistaken.[88] In this way, a judicial requirement of planning is a strategic adaptation to the limits of judicial competence.

Professor Eisgruber gives strategic judgment an important place in his account of judicial review. In his view, courts have a comparative advantage over legislatures:

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micromanage prisons, see MALCOLM FEELEY & EDWARD L. RUBIN, JUDICIAL POLICY MAKING AND THE MODERN STATE: HOW THE COURTS REFORMED AMERICA'S PRISONS (1998).

87. *See* EISGRUBER, *supra* note 1, at 165.

88. Some admirers of the Canadian Charter of Rights point to the role that the Charter's first section might play in a dialogue of this sort between courts and legislatures. Section 1 says that the rights later enumerated can be limited when limitation "can be demonstrably justified in a free and democratic society." CAN. CONST. ACT OF 1982, Charter of Rights and Freedoms, § 1. A court might find a limitation not "demonstrably justified," and the legislature might respond by providing the demonstration that the court initially found lacking. For an example, *see* KENT ROACH, THE SUPREME COURT ON TRIAL: JUDICIAL ACTIVISM OR DEMOCRATIC DIALOGUE 185–86, arguing that a reenactment of invalidated tobacco advertising limitations "would have been more defensible if the government was prepared to reveal . . . studies . . . to show that absolute advertising bans were more effective than bans on lifestyle advertising. If the studies did not exist, the government could have commissioned them."

> [W]hen it comes to the identification of moral principle, and if we want judges to give practical effect to that comparative advantage, then we must permit judges to make some strategic judgments as well—even if we believe that judges have *no* comparative advantage over other political institutions with regard to matters of strategy.[89]

Judges, Professor Eisgruber says, may "make incompetent strategic choices," and he believes that "the strongest arguments for judicial restraint derive . . . from the inability of judges to claim expertise with respect to the practicalities that predominate when moral principle is translated into legal policy."[90] For standard constitutional liberals, those practicalities rule out the use of courts to implement the principles of distributive justice that constitutional social welfare rights might enact.

One might distinguish between the strategic judgments that underlie *Grootboom*-like review and those that underlie the cases Professor Eisgruber discusses, on the ground that the latter lead to what we might call overenforcement of the deeper moral judgments the judges make, while the former lead to underenforcement of such judgments. For example, the moral judgment that justifies constitutional limits on libel law might be this:

> [T]he government must not adopt any policy that denies people a reasonable opportunity to express their own ideas about what is true or good, or that fails to respect people's freedom to make their own judgments about which opinions and ideas are valuable ones.[91]

But, Professor Eisgruber points out, the specific constitutional limits on state libel law go beyond the enforcement of that basic principle, protecting more speech than the principle alone would protect. In contrast, the *Grootboom*-like requirement to plan obviously does not come close to enforcing whatever distributive justice requires with respect to housing.

The distinction between overenforcement and underenforcement returns us to the observation that the cases of libel, the public forum, and *Palmore v. Sidoti*[92] show that courts *do* make decisions with implications for distributive justice. Overenforcing the moral right to free expression affects the distribution of the monetary value attached to reputation in a way that enforcing the basic moral judgment would not. Strategic judgments of the sort Professor Eisgruber endorses en-

89. EISGRUBER, *supra* note 1, at 139.

90. *Id.* at 140.

91. *Id.* at 137.

92. 466 U.S. 429 (1984).

tail that the line Professor Eisgruber draws between discrete and comprehensive judgments is not as sharp as he would have it. Put another way, the strategic judgments that justify the courts' role in those cases demonstrate that courts do not categorically lack the capacity to make acceptable decisions about comprehensive principles. *Grootboom*-like review blurs the line between discrete and comprehensive principles further, by introducing the possibility of a form of judicial review in which the demands on the courts' ability to make strategic judgments are dramatically reduced. If courts are good enough to implement the moral principles embedded in libel law, they are good enough to implement social welfare rights—once we understand that the range of possibilities for judicial review goes beyond the order of damages or the injunction directing a government official to act (or refrain from acting) with respect to a specific individual on a specific occasion.[93]

Conclusion

Readers will certainly have noticed the tension—or even contradiction—between the arguments developed in Parts I and II of this Review-Essay. In Part I, I argued that Professor Eisgruber endorsed *too much* judicial review because he overstated the differences between judges and elected officials with respect to their ability to articulate and act upon moral principle. In Part II, I argued that Professor Eisgruber endorsed *too little* judicial review because he drew a distinction between discrete and comprehensive moral principles that is untenable once we understand that there are more forms of judicial review than the mandatory injunction and damage award. Both lines of argument could be right, in the following way: *Grootboom*-like review reduces the significance of disagreement over moral principles between judges and elected officials by allowing repeated interactions in which each set of officials learns from the other, and neither has the kind of priority that arises in strong-form judicial review (for judges) or in parliamentary supremacy (for elected officials).[94]

93. In a more elaborate presentation I would develop the argument, the lines of which should be obvious, that even a court limited to awarding damage relief to a named individual plaintiff can sometimes implement comprehensive moral principles.

94. The predominant metaphor in the "Commonwealth" model of judicial review is that of a dialogue between judges and elected officials. The leading discussion is Peter Hogg & Allison Bushell, *The Charter Dialogue between Courts and Legislatures (or Perhaps the Charter of Rights Isn't a Bad Thing After All)*, 35 OSGOODE HALL L. J. 75 (1997). I think it quite difficult to construct a dialogic account of judicial review where the practice takes the form that Professor Eisgruber implicitly defends.

Professor Eisgruber's argument positions him between the alternatives described in Parts I and II, but, I believe, the location is intellectually unstable.[95] The allusion to Goldilocks is inescapable: Professor Eisgruber wants judicial review to be neither too cold nor too hot, but just right. There is a reason, though, that the Goldilocks story is included in collections of fairy tales.

95. It is, of course, quite stable as a matter of social practice: Almost everyone engaged in the practice of judicial review, including judges and litigators, defends the form of judicial review Professor Eisgruber defends.